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CURRENT TOPICS.

In the case of Bryant v. Western Union Tel. Co., the Circuit Court of the United States, for the District of Kentucky, has added another to the interesting line of adjudications, defining and limiting the rights and liabilities growing out of the transactions, known as option deals, and sometimes stigmatized as "grain gambling." The proceeding was for injunction to prevent the defendant from removing from their office a "ticker" by means of which they were accustomed to be furnished with the grain and provision quotations from the Chicago Board of Trade. The telegraph company was proceeding to do this in pursuance of a notice from the Board of Trade, prohibiting it from furnishing their quotations to persons carrying on what are known as "bucket shops;" and the main question in the case was whether the business of the plaintiffs was a "bucket shop," i. e. whether its transactions were gambling transactions.

Says the opinion (Barr, J.): There is filed with one of the affidavits a pamphlet issued by complainants, explaining their business and urging the public to deal with them. From this pamphlet and the affidavits filed by the parties, I find that complainants' course of dealing is about this: The complainants never buy or sell for present delivery, but always deal in futures and upon margins. Whenever the required margin is placed in the hands of complainants, they will buy or sell, as customers desire, grain, etc., at the last quotation of the Chicago Board of Trade. This is always for the next or succeeding month's delivery, and the deal is taken by the complainants themselves. The customer must always keep his margin good, and that without notice; and if any time before the time fixed for the delivery, the market in Chicago goes against the customer to the extent of his margin, the trade is closed and the complainants take the margin and the customer is not personally liable, the extent of his loss being his margin. If, however, the market should go in favor of the customer, he may call for a settlement at any time and without regard to the maturity of his contract, and he is then paid the difference between the then market price and the price at which he bought or sold, less a sum which is called by complainants "a commission." This sum, which is one-fourth of a cent on each bushel of grain which is alleged to be bought or sold, is not a commission, as the complainants always take the deal themselves, and do not pretend to buy or sell to others for the account of the customer, but is really the odds which the customer gives them in the wager on the future of the market. It is perhaps true that if the customer keeps his margin good, so that he can not be closed out, and does not exercise his right to settle upon the basis of the difference in the prices of the grain, etc., he can demand a compliance with the contract and a delivery; but if the course of business between the complainants and their customers is to settle their alleged contract by a payment of the differences in the market rates, the fact that a customer may, under certain circumstances, require an actual delivery, does not relieve the complainants from the charge of carrying on a "bucket-shop." It is the general course of a man's business which defines and classifies it. If "bucket-shop" means a place where wagers are made upon the fluctuations of grain and other commodities, then I think the evidence shows the complainants keep such a "shop," and are of the class to which defendants are prohibited from furnishing the market quotations of the Chicago Board of Trade. This is gambling, and a very pernicious and demoralizing species of gambling, which a court of equity should not protect, even if the board of trade had not taken the action it has. It is true that this kind of gambling has not yet been made criminal by the statute law of the State, still if a case of wager is made out, none of the State courts will enforce such contracts. Sawyer v. Taggart, etc., 14 Bush, 727. Gambling on the fluctuation in the market prices of stocks, grains, etc., is against the public policy of the State, though it may not be a crime punishable by fine or imprisonment.

DEFECTIVE COVENANTS.

The introduction of labor-saving blanks has not been in all respects an unmixed blessing. Not only have they served to beget habits of carelessness and inattention in regular practitioners, but by furnishing in an abstract form the technical knowledge requisite to the draughting of instruments, the art of conveyancing has become debased, and the office of the conveyancer has lost its dignity in the frequent usurpations to which it has been subjected. Ignorant officials, as well as ambitious but economical individuals, each in turn assume the duties of the conveyancer, and with the aid of the accommodating blank, affect to perform the functions of his office. As a natural result, we frequently meet with many atrocious examples of conveyancing, and courts are often called upon to interpret the efforts or construe the inartificial expressions of the unskilled draughtsman. The very liberal construction now awarded deeds and other instruments, as well as the operation of statutes, which, in a large measure, have destroyed the effect of common law rules, serves in some degree to counteract the errors, omissions and defects of the smateur conveyancer; yet such is the ignorance prevailing among the classes named, of the nature and effect of the operative parts of deed, that parties are frequently surprised into contracts they have not made and never intended. Particularly is this true in respect to the expressed covenants, the technical nature of which are but slightly understood by the masses, and vital defects are more frequently met with in these clauses than in any other part of the deed. The printed covenant clause ordinarily commences somewhat as follows: "And the said ——, for ——, heirs, etc., does covenant," etc. Through ignorance or carelessness, the draughtsman sometimes neglects to fill either of these blank spaces, the first of which is intended for the names of the covenanting parties, and the second for personal pronouns indicative of same. The effect of an omission to fill these blanks is to render the entire clause nugatory, for where these spaces are not filled by the insertion of any names, the inference naturally arises that no such covenant was intended to be made; nor can the context, by construction, supply the omission.[1] This is, however, an extreme case, for the use of the first space is so obvious that few persons of ordinary comprehension will mistake its purport; but the rock on which the amateur conveyancer usually splits is the second space. This, when properly filled, contains two pronouns, as, "themselves, their," but the draughtsman, misled, perhaps, by the context, and of course ignorant of the legal effect of the expression, usually inserts only the word "their," and in this condition the deed is delivered and accepted.

The frequency with which this error is found by examiners of titles, and the weight to be given to it in framing opinions of title, justifies an inquiry into its legal effect. In this instance, not only is there no direct covenant on the part of the granting party, but there is an unequivocal covenant for the heirs of such party; and though courts are ever inclined to construe evident errors and omissions of the clerk liberally, and to give effect to the instrument according to the manifest intention of the parties,[2] yet the principle is well settled, that the liability of parties under a contract must depend upon the terms they have seen fit to use, and not upon those they might have used;[3] while mistakes of law never afford ground for equitable relief.[4]

Now, in the example under consideration, there is neither uncertainty nor manifest error, and the legal effect of a covenant of this character is, not that the grantors will defend the title, but that the same shall be defended by their heirs, etc. It does not give a right of action against the grantors on the loss of title, but provides a remedy against their heirs and legal representatives; it exempts the grantors from personal liability, but binds their descendants in respect of the estate that may be cast upon them; it is not like a covenant that a person who is not a party to the deed shall warrant and defend the title, for in such case, upon the eviction of the grantee, and the failure of such third person to comply with the terms of the covenant, an action might be maintained against the grantors, on

[1] Day v. Brown, 2 Ohio, 345

[2] Callins v. Lavalle, 44 Vt. 230; Churchill v. Reamer, 8 Bush (Ky), 256; Peckham v. Haddock, 36 Ill. 38.

[3] Day v. Brown, 2 Ohio, 345; Bobb v. Bancroft, 13 Kan. 123; Walker v. Tucker, 70 Ill. 527.

[4] Hayes v. Stiger, 29 N. J. Eq. 196; Morris v. Hogle, 37 Ill. 150.

the familiar principle that what a party undertakes shall be performed by another, he must himself perform on the default of that other. In this case, the covenant is that the act shall be performed by parties who can have no legal existence during the life of the grantors, and until their decease there is no person living who can be called upon to avouch the title. [5]

Such are the views expressed by the Supreme Court of Illinois, and they would seem to be founded in reason and upon sound principle, and in States, where by statute no covenants can be implied in deeds or other instruments, the conclusions above stated would appear to be irresistable, yet in Wisconsin, where a statute similar to that just mentioned has long been in force, and where this question has twice been presented, a result diametrically opposed to that above given has been reached. In the first case,[6] it was held, that although the covenant might be defective in law, yet equity would always supply the omission in conformity with the evident intention of the grantor, while in the second,[7] the covenant was sustained as that of the grantor, notwithstanding the omission. In neither case, however, do the decisions appear to have been reached by much reasoning, nor do the learned judges fortify same with any citation of authority. The reason assigned in the first instance is obviously defective and incorrect, for the "evident intention of the grantor" cannot be better determined than from the language of the conveyance,[8] and where the language is unambiguous, although the parties may have failed to express their real intention, there is no room for construction, and the legal effect of the agreement must be enforced.[9] Words and phrases are always to be taken in their commonly accepted sense, unless a diferent intent plainly appears, and where words have a well defined, specific meaning, importing intention, they cannot be altered, limited or enlarged in their meaning by implication or extrinsic evidence.[10]

[5] Traynor v. Palmer, 86 Ill. 477; Ruffner v. McConnell, 14 Ill. 168.
[6] Stanley v. Goodrich, 18 Wis. 505.
[7] Hilmert v. Christian, 29 Wis. 104.
[8] German Ins. Bank v. Nunes, 14 Reporter 206.
[9] Walker v. Tucker, 70 Ill. 527; Callender v. Dinsmore, 55 N. Y. 200; Fire Ins. Co. v. Doll, 35 Md. 89.
[10] Galena Ins. Co. v. Kupfer, 28 Ill. 332.

It is a rule of universal recognition that when parties deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or the extent of such engagement, it is conclusively presumed that the whole engagement of the parties, its extent and manner, is thereby expressed. To add to it by implication would be to vary its terms,[11] and though contracts must always receive a liberal interpretation, yet courts are powerless to disregard the terms of a contract plainly expressed, and their only duty is to enforce same according to the intent of the parties as shown by the language used.[12]

The omission, it is true, might readily be inferred, with reference to the established custom of drawing conveyances and the insertion of covenants, but the rule still remains that where parties have settled the terms and conditions of a contract by agreement, which has been reduced to writing, they must be governed by its provisions, and will be concluded by it regardless of any usage or custom.[13]

A different case is presented in an imperfectly filled blank, but which still indicates an intention. Thus a covenant by grantors "for them—heirs" etc., has been construed "themselves, their heirs" etc., and held to be the covenant of the grantors,[14] but in this instance the intention is clearly manifest and the error of the clerk very palpable. The question of construction in such a case is comparatively simple and the imperfect words shows the intention of the grantor. The neglect to insert the word "their" was also immaterial, as would have been the word "heirs," for the legal effect of the covenant would have been the same if all reference to the heirs, executors and administrators had been omitted.[15]

It would therefore appear to the writer, that the error or omission above alluded to is a matter of paramount importance in the investigation of titles, and one that should be observed by every attorney in passing opinions on the same, and though the defect does

[11] Merchants Ins. Co. v. Morrison, 62 Ill. 242.
[12] Coey v. Lehman, 79 Ill. 173; Kimball v. Custer, 73 Ill. 389.
[13] Corbett v. Underwood, 83 Ill. 324; Kimball v. Custer, 73 Ill. 389; Moran v. Prather, 23 Wall. 492; Callender v. Dinsmore, 55 N. Y. 200.
[14] Baker v. Hunt, 40 Ill. 264.
[15] Hall v. Bumstead, 20 Pick. 2; Bell v. Boston, 101 Mass. 506.

not reach the merits of the title, it is one of which the client should be informed and the legal effect of which he should be apprised.

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THE RIGHT TO THE CUSTODY OF CHILDREN.—III.

By the Infants Custody Act, 1873,[1] section 2, it is provided that no agreement in any separation deed made between the father and mother of an infant shall be held to be invalid by reason only of its providing that the father of such infant shall give up the custody or control thereof to the mother; but, such agreement shall not be enforced if the court be of opinion that it will not be for the benefit of the infant to give effect thereto. And though this enactment applies in terms only to agreements contained in deeds, and not to contracts to execute separation deeds, it has been observed that, as the invalidity of the deeds themselves is removed, the whole objection to the specific performance of the contract falls also.[2] We may add that, even before the Act, it appears to have been held that a separation deed giving the custody of infants to their mother, might be enforced if it were for the infants' benefit.[3] Constant drunkenness of the mother,[4] or atheistical opinions, not merely held but openly proclaimed,[5] will induce the court to refuse to enforce the father's agreement to give up the custody and control of the children, and order them to be delivered to him. In a recent case, reported in the September number of the *Law Journal*, where, by a deed of separation, a husband and wife agreed to live separately for the rest of their lives, and the husband covenanted to permit the wife to have the custody of the children, wholly freed from his authority, as if she were a *femme sole*, but the marriage was afterwards dissolved on the ground of the wife's adultery, and the husband had taken possession of the children, Sir James Hannen held that the agreement ought not to be enforced[6] And, apart from the statute, it appears to us that a father "has not, either in law or equity, the power to abrogate his parental functions, and say that the custody of the children shall be given to his wife," as Jessel, M.R., said in Besant v. Wood;[7] and "no such substitution or delegation (to the mother, of the father's rights and powers in respect of his children) is possible by our law," as James, L.J., said in *Re* Besant. "The general doctrine appears to us," says an American writer,[8] "on the whole to be this: That public policy is against the permanent transfer of the natural rights of a parent; and that such contracts are not to be specifically enforced, except" in the cases of master and apprentice and legal adoption. And so, on the ground that the law of England gives to the father the custody and control of his children, and casts on him, without the power of renunciation or delegation, the duty of caring for them and seeing to their education.[9] Contracts by a father to allow an infant son to remain under the care of his mother,[10] that the mother should have the children above seven years of age,[11] and to allow an infant daughter to remain under the control of, and to be educated and supported by her mother,[12] have been held incapable of enforced performance. But the general rule is only that the custody of children can not be made a mere matter of bargain,[13] not that the husband can in no circumstances bind himself not to set up his paternal rights;[14] and as to the validity of partial restrictions of his right. See Hamilton v. Hector.[15] The subject has been a good deal discussed of late by American writers, who, like the adjudications on which they have treated, have adopted antagonistic conclusions.[16] But, whatever

[1] 36 & 37 Vic., c. 12.

[2] Fry, Spec. Per. (2d ed.), 651.

[3] Swifte v. Swifte, 4 De G. F. & J. 710; 11 Jur. N. S. 458.

[4] *Re* Carnegie, Seton, Decrees (4th ed.), 1673; see *Re* Skinner, 9 B. Moore, 278; Ball v. Ball, 2 Sim. 39; Wellesley v. Duke of Beaufort, 2 Russ. 30.

[5] *Re* Besant, 11 Ch. Div. 508; 40 L. T. N. S. 469.

[6] Jump v. Jump, 52 L. J. Pro. 71.

[7] 12 Ch. Div. 605; 48 L. J. Ch. 497; 40 L. T. N. S. 445.

[8] Schouler, Dom. Rel. 343.

[9] Lord St. John v. Lady St. John, 11 Ves. 525; Lord Westmeath's Case, Jac. 251, n.; *In re* Browne, 2 Ir. Ch. Rep. 150; *In re* Moore, 11 Ir. C. L. Rep. 1; *In re* Alicia Race, 7 E. & B. 204; see 3 Jur. N. S. (Part II.) 92; R. v. Smith, 17 Jur. 24; *Re* Andrews, L. R. 8 Q. B. 153; Andrews v. Salt, L. R. 8 Ch. 622, 636.

[10] Hope v. Hope, 8 De G. M. & G. 731.

[11] Vansittart v. Vansittart, 4 K. & J. 62; 2 De G. & J. 249, 259.

[12] Walrond v. Walrond, John. 18.

[13] Chapsky v. Wood, 26 Kan. 640; 13 Cent. L. J. 494; see *infra*.

[14] Swifte v. Swifte, *ubi supra*.

[15] *Supra*.

[16] See 15 Cent. L. J. 285; 1 Ib. 54; 16 West. Jur. 437;

view prevail, the matter which is deemed of primary and paramount importance, is the interest and welfare of the child.[17] Society has an interest in the welfare and morals of the infant; and it is on behalf of the public, as has been said, that in determining questions of custody, the interests of the child forms the leading consideration.[18]

The general principles resulting seem to us to have been laid down soundly, and in conformity with the English doctrine, in the recent American case of Chapsky v. Wood,[19] as follows: (1), "The father is the natural guardian, and is *prima facie* entitled to the custody of his minor child. This right springs from two sources: One is, that he who brings a child, a helpless being, into life, ought to take care of that child until it is able to take care of itself; and because of this obligation to take care of and support this helpless being, arises a reciprocal right to the custody and care of the offspring whom he must support; and the other reason is, that in the law of nature, the affection which springs from such a relation as that is stronger and more potent than any which springs from any other human relation. The second proposition of law is, that a child is not in any sense like a horse or any other chattel, subject-matter for absolute and irrevocable gift or contract. The father can not, by merely giving away his child, release himself from the obligation to support it, nor be deprived of the right to its custody. In this it differs from the gift of any article which is only property. If to-day Morris Chapsky should give a horse to another party, that gift is for all time irrevocable, and the property never can be reclaimed; but, he can not, by simply giving away his child, relieve himself from the obligation to support that child, nor deprive himself of the right to its custody. * * * * The third proposition is, that a parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. If it were, it would end this case and relieve us from all future difficulties. A mere right of property may be asserted by any man, no matter how bad, immoral or unworthy he may be; but no case can be found in which the courts have given to the father who was a drunkard and a man of gross immoralities, the custody of a minor child, especially when that child is a girl. The fact that in such cases the courts have always refused the father the custody of his child, shows that he has not an absolute and uncontrollable right thereto. The fourth proposition is, that though the gift of the child be revocable, yet when the gift has been once made and the child has been left for years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then, whether the courts will enforce the father's right to the custody of the child, will depend mainly upon the question whether such custody will promote the welfare and interest of such child. This distinction must be recognized. If, immediately after the gift, reclamation is sought, and the father is not what may be called an unfit person by reason of immorality, etc., the courts will pay little attention to any mere speculation as to the probability of benefit to the child by leaving or returning it. In other words, they will consider that the law of nature, which declares the strength of a father's love, is more to be considered than any mere speculation whatever as to the advantages which possible wealth and social position might otherwise bestow. But on the other hand, when reclamation is not sought until a lapse of years, when new ties have been formed and a certain current given to the child's life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. It is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel. The fifth proposition is, that in questions of this kind, three interests should be considered: The right of the father must be considered; the right of the one who has filled the parental place for years should be considered. Perhaps it may not be technically correct to speak of that as a right; and yet they who have for years filled

26 Alb. L. J. 26, 46; and see Bonnett v. Newmeyer, *Reporter*, Boston, Aug. 8, 1883, p. 172.

17 Bonnett v. Newmeyer, *ubi supra*; Schouler, Dom. Rel. 343; and see the California statute, Civil Code, sec. 246.

18 State v. Bratton, 15 Am. L. Reg. 359; Blissit's Case, Lofft, 728, n; Hope v. Hope, 8 De G. M. & G. 743.

19 *Ubi supra.*

the place of the parent, have discharged all the obligations of care and support, and especially when they have discharged these duties during those years of infancy when the burden is peculiarly heavy, when the labor and care are of a kind whose value can not be expressed in money—when all these labors have been performed and the child has bloomed into bright and happy girlhood, it is but fair and proper that their previous faithfulness, and the interest and affection which these labors have created in them, should be respected. Above all things, the paramount consideration is, what will promote the welfare of the child?"

The latest case upon the branch of this subject so far considered is *In re* Scarritt,[20] holding (1), that a father's right and duty to have the custody of his child spring from the law of nature, and public policy, and that, for the good of society, and by the doctrine of the common law, he can not irrevocably divest himself of or abandon them; (2), that in a contest for the possession of the person of a minor child, the welfare of the child is always the controlling consideration with the courts, and that, if the contest is by a father seeking to regain his child, as he is its natural guardian, and as such entitled to the custody of its person, it will be awarded to him, unless he is shown to be, for some reason, unfit or incompetent to take charge of the child, or unless the welfare of the child, for some special or extraordinary reason, demands a different disposition. The interests of the children is, also, the primary consideration under the Infants Custody Act, 1873;[21] and so, under the English Matrimonial Causes Acts;[22] and so in Scotland,[23] and see the California Civil Code.[24] But, at common law, those interests could be only very inadequately protected; for the courts, though they would enforce the father's rights, were incapable of enforcing his duties. They could not coerce him to give his child a moral and religious education, nor yet could they appoint another person to do so in his stead. The right of the father, or testamentary guardian of his appointment, and of the mother as guardian for nurture after the father's death, there being no testamentary guardian, was treated as paramount, and could be enforced by writ of *habeas corpus*, which, when the child was too young to select his custody, the courts had no jurisdiction to refuse, unless cruelty, or contamination from the gross immorality of the father or guardian was to be apprehended.[25] But the court of Chancery took a less rigid view of the rights of the father or guardian, and looked more to the interests of the children. For in equity the father or guardian might lose his right to the custody of the children, not only by immorality of a nature to contaminate the child, or by ill-usage, but where the capricious exercise of that right would materially interfere with the happiness and welfare of the children, or where the right had been forfeited by acquiescence, or where the father had so conducted himself or was placed in such a position as to render it not merely better for the children but essential to their safety or to their welfare in in some very serious and important respect, that his rights should be superseded or interfered with. And now by the Judicature Act,[26] it is provided that, in questions relating to the custody and education of infants, the rules of equity shall prevail. But, while the jurisdiction of the courts is so far rendered concurrent, it is not co-equal in other respects. For instance, though in Goldsworthy's case,[27] the Queen's Bench Division, on the ground of the father's gross and habitual intemperance, violence, and constant use of improper and outrageous language, refused to restore a boy of nine years to the custody of his father from that of his maternal grandfather, yet, if the application had been to remove the child from the custody of the father or other legal guardian instead of from that of his grandfather, the proceedings would probably have been transferred to the Chancery Division, to which the wardship of infants still appertains,[28] in which the condition to have been considered would have been the ability to provide another fit and proper guardian over whom the court could exercise due surveillance with suitable direc-

[20] Noted in the *Albany Law Journal* of August 25.
[21] *Re* Taylor, 4 Ch. D. 157; Besant v. Wood, 12 Id. 605.
[22] Dixon on Divorce, 356.
[23] Symthington v. Smythington, L. R. 2 H. L. 415; 2 R. 41.
[24] Sec. 246.
[25] See *Re* Andrews, L. R. 8 Q. B., at p. 158.
[26] Sec. 28, sub-sec. 10.
[27] 2 Q. B. D. 75.
[28] Jud. Act, sec. 56.

tions, and the ability to secure some permanent provision for the child's maintenance and education.

In stating the rule of the common law we circumstanced that the child was too young to select his custody. "If the infant be of an age to elect for himself, the court will merely interfere so far as to set it free from illegal restraint, without handing it over to anybody," it was said in *Re* Andrews.[29] "If the child is of sufficient age to have an intelligent preference, the court may consider that preference in determining the question" who shall be its guardian or have its custody, provides the California Civil Code. When, then, will the wishes of the child be consulted? The English and American doctrines on this subject seem not to agree. By the English authorities it appears that the child will not be consulted when under fourteen in the case of a male, or under sixteen in the case of a female;[30] and the right to such election is held to depend upon age alone, and not upon mental capacity.[31] "It appears to us to be clear that the law is established that if the daughter is under the age of 16, she is prevented from expressing any opinion of her own on the subject, and disputing the legal right of her parents," said May, C. J., in *Re* Smythe,[32] "The court never consults a child under seven years of age," said Jessel, M. R., in *Re* Carey; but Fitzgerald, J., appears to have been willing to examine a boy under eight, in *Re* Medley.[33] (As to examination with reference to religious convictions, see, *inter alia*, *Re* Agar-Ellis, and Meades, Minors.[34] But, in America, age is not the only criterion regarded. The child's capacity, of which its information, intelligence, and judgment, ascertained by making or ordering a private examination, are evidences, will be considered; and though a child but seven or eight years of age has been deemed too young in point of law to make an election, children slightly over that age have been frequently consulted.[35] Yet, though the wishes of a child within the age of nurture will be consulted, they will not necessarily be followed, but the court will look to its interests, and never let it depart in obviously improper custody.[36] And so, as we have seen, the wishes of a male ward of court, though he was over seventeen, were disregarded in the recent English case of *Re* Plomley.

It remains to notice that by section 1 of the Infants Custody Act (section 2 of which has been already discussed) it is provided that on petition, by her next friend, of the mother of infants under sixteen years of age, the court of Chancery may order that she shall have access to and the custody and control of them, subject to such regulations as to access by the father or guardian of the infants as the court shall deem proper. The effect of this statute is to place the custody of infants entirely within the discretion of the judge;[37] and if it does not enable a mother to resist the father's application for the child's custody at law, it enables her to apply for an order of access.[38] Under the Scottish law we find it held that the mother has, during the father's life, right of access to the children, the exercise of which he cannot prevent unless in circumstances of grave misconduct.[39] In the recent case of Symington v. Symington,[40] where there was a judicial separation on the ground of adultery, the husband was held entitled to the custody of the sons, and the wife of the daughters, during pupilarity, subject to the orders of the Court as to access. While, in the case of Bowman, otherwise Graham,[41] it was held that, where a husband has divorced his wife on the ground of her adultery, the court will not, unless in exceptional cases, interfere with his discretion in the matter of allowing or refusing her access to the children of the marriage. In England it was held, in the divorce court, that, when the marriage is dissolved on the ground of adultery, the adulterous parent will not ob-

[29] *Ubi supra.*

[30] R. v. Clarke, 7 E. & B. 186; R. v. Howes, 3 E. & E. 332; Mallinson v. Mallinson, L. R. 1 P. & M. 221; Ryder v. Ryder, 9 W. R. 440; *Re* Andrews, L. R. 8 Q. B., at p. 159; *In re* Connors, 16 Ir. C. L. R. 112; Cartledge v. Cartledge, 2 Sw. & Tr. 567; *In re* Hyde, 29 L. J. Mat. 150.

[31] R. v. Clarke, *Re* Andrews, *ubi supra*; *In re* Shanahan, 5 Ir. Jur. 58.

[32] 11 Ir. L. T. Rep. 122.

[33] 5 Ir. L. T. Rep. 60.

[34] *Ubi supra.*

[35] See 16 West. Jur. 445; 15 Cent. L. J. 494.

[36] *Ibid.*

[37] *Re* Taylor, *ubi supra.*

[38] See Corsellis v. Corsellis, 1 Dr. & W. 235; Wellesley v. Duke of Beaufort, 2 Russ. 43; *In re* Flynn, 2 De G. & Sm., at p. 475.

[39] A. B. v. C. D., 10 D. 229; M'Iver v. M'Iver, 21 Ib. 1103; And see Lilley v. Lilley, 4 R. 397.

[40] *Ubi supra.*

[41] Scottish Law Reporter of Sept. 5th.

tain an order for either custody or access.[42]

It is not to be forgotten that the English court of divorce has been armed by statute (similar to legislation also to be found generally established in America) with very strong and exceptional powers, in suits for judicial separation, nullity, or dissolution, for adjudicating upon the questions of the custody, maintenance, and education of the children.[43] The court acts upon its own discretionary power, exceeding that which had been previously exercised by courts of law or equity, and the Queen's Bench and chancery jurisdiction are no guide to it; and when neither husband nor wife are fitted to have the care and custody of the children, it will be entrusted to third parties, reasonable access being allowed—either to interveners, if found desirable, or to a nominee of the court.[44] But still, there are many indeed (among whom we may be included) who hold that yet further legislation is necessary on the subject of the right to the custody of children.[45] A bill on that subject was in fact introduced by Mr. O'Shaughnessy (ex-M. P. for Limerick) shortly after the decision in *Re* Agar-Ellis; and Mr. Bryce, M. P., has given notice of another bill to amend the law relating to the guardianship of children, which he proposes to introduce next session. "The cruelty and injustice of the existing law, which regards parental rights so far as concerns legitimate children as the rights of the father solely, ignoring the mother, has long been acknowledged and resented by the majority of thoughtful persons, and the necessity of its reform is admitted on all hands," writes Mrs. Elmy, whose services were so well-known and effective when acting as Secretary of the Married Women's Property Committee. To the successful legislative results achieved by that association we contributed, by our report of Lynch and Wife v. Cork and Macroom Ry. Co., to which we made reference at the time; and it would be a matter of satisfaction, if the present discussion, involving a comparison of the laws prevailing in different countries, were also to furnish some food for reflection, and possibly some assistance to those who, with Mrs. Elmy, "hold that the law of the land should recognise and sanction the natural rights of the mother as well as the natural rights of the father." It may be that we are on the eve of new legislation on this subject; but, how far will it go? "As between the father and the mother, or any other near relation of the infant, where sympathies on either side of the tenderest nature may be relied on with confidence, the father is generally to be preferred," it was said in the American case of Verser v. Ford.[46] "In the great majority of cases, his greater ability and knowledge of the world renders him the fittest protector, although that is not the test. The preference is conceded to the ties of duty and affection, and attends the primary obligation of the father to maintain, educate, and promote the happiness of the child, according to his own best judgment and the means within his power. Any system of jurisprudence which would enable the courts, in their discretion and with a view solely to the child's best interests, to take from him that right and interfere with those duties, would be intolerably tyrannical, as well as Utopian."—*Irish Law Times.*

[42] Bent v. Bent, 30 L. J. P. & M. 175; Clout v. Clout, 30 Ib. 176; Seddon v. Seddon, 31 Ib. 102; Boynton v. Boynton, 30 Ib. 156; And see the recent case of Jump v. Jump, *ubi supra.*

[43] See Dixon, Divorce, 355, *et seq.*

[44] *Ibid.*

[45] As to which, in addition to the works already cited, reference may be made to Spence, Eq. Jur.; Story, Eq. Jur.; Macpherson, Infants; Frazer, Parent and Child; Tyler, Inf.; Bishop, Mar. & Div.; Eiffe, Jud. Act; Ferguson, Jud. Act.

[46] 37 Ark. 27.

HABEAS CORPUS—KIDNAPPED PRISONER—EXTRADITION.

EX PARTE KER.

United States Circuit Court, Northern District of Illinois, October 8, 1883.

Where a person has been arrested under process of a court of competent jurisdiction legally issued and served, it is no ground for discharging him under writ of *habeas corpus* that he was unwarrantably seized in a foreign jurisdiction and brought without warrant of law into the jurisdiction of the court.

Robert Hervey and *C. J. Beattie*, for prisoner; *Leonard Swett*, against petitioner.

Counsel for Ker claimed as ground for discharge on *habeas corpus.*

1. That the Constitution of the United States and of the State of Illinois expressly provide that no man shall be deprived of life, liberty

or property without due process of law. Process may be regular on its face; may be issued by a court of competent jurisdiction, still if executed in such manner or under such circumstances as the law does not permit arrest it is not due process of law.

2. A treaty of the United States with a foreign State is the supreme law of the land. So declared to be by sec. 2 of art. 6 of the Constitution of the United States, and all judges and courts shall be bound thereby.

3. There was a treaty between the United States and Peru, ratified in 1870, and in full force at the time of the transaction, which provided for the extradition of parties charged with crime from one country to the other, on certain formalities being observed and proofs made.

4. It is the well settled law of this country, that where there is a treaty providing for the mode of extradition under it, all other modes of getting possession of the alleged criminal are excluded. He must be got out of the jurisdiction of the country where he is domiciled under the terms of the treaty, or he can not be got out at all. His right of asylum can not be interfered with in any other way, and if done it was a violation of the treaty.

5. Ker was forcibly kidnapped from Peru, and without any regard to the treaty stipulations, was forcibly brought to Cook county and delivered to the sheriff, by whom the writ of capias from the criminal court was served on him, and on which he is now held in custody. It is claimed that, owing to the manner in which he was brought to Cook county, the criminal court never acquired jurisdiction of his person; that the process, though regular, was not, under the circumstances, due process of law; that he was brought into this jurisdiction against his will, in violation of a treaty; or, in other words, of the supreme law of the land.

6. The Act of Congress of 1867 exressly provides that any person restrained of his liberty, in violation of any treaty of the United States, may petition any Federal judge or court for a writ of *habeas corpus*, and it is the duty of such judge or court to grant the writ.

This act gives a new right to the party aggrieved, which may not have existed before. Now, however, the right is absolute. These are briefly the grounds on which the counsel for Ker claimed that he ought to be discharged.

Principal authorities cited by counsel for petitioner: Spear on Extradition, various references throughout the entire work; Cooley's Const. Limitations, 16, note 1; Ib. 52, note 1; People v. Curtis, 50 N. Y. 321; People v. Brady, 56 N. Y. 182; *Re* White, 49 Cal. 934; *Re* Cannon, 17 Mich. 981; Blandford v. State, 10 Tex. (Ct. of App.) 627; Commonwealth v. Hawes, 13 Bush (Ky.) 327; Jones v. Leonard, 50 Iowa, 106; Act of Congress, February 2, 1867, giving writ of *habeas corpus* on application of party claiming to be illegally restrained of his liberty in violation of a treaty of the United States.

DRUMMOND, Circuit Judge, delivered the opinion of the court:

This is an application on the part of Frederick M. Ker for a writ of *habeas corpus* to issue, to inquire into the cause of his imprisonment, and, if it be found to be unlawful, that he shall be discharged therefrom. The rule upon the subject is that if on an application of this kind the court is of opinion that the writ, if issued, would not authorize the discharge of the defendant; then it is not necessary to issue it. The law does not require a vain act to be done. I have come to the conclusion in this case I will not issue the writ. I will state briefly the reasons why I have reached this conclusion.

The defendant was charged with the offense of larceny and forgery committed within the jurisdiction of the court where the two indictments have been found. In considering the question we may assume, for the purpose of this motion, that these offenses were actually committed. After they were thus committed the defendant left the country and fled to Peru, in South America. While there he was under the protection of the laws of Peru, and could not be legally removed therefrom except in accordance with the laws of that country.

The United States had made a treaty under which Peru agreed, in the manner therein stated, to return to the United States certain offenders who had fled to that country and claimed the protection of its laws. Of course, Peru was only bound to return the offender in the manner stated in the treaty. It has been said in argument that a person could not be returned who had escaped from justice from the United States and taken refuge there in any other way than under the terms of the treaty. That, perhaps, is true, provided there was no other way, under the laws of Peru. I do not know that the fact that a treaty was made between the United States and Peru, by which the latter State agreed to return fugitives from justice to the United States, prevented that country from declaring under its own laws, that persons might be returned to the United States independent of the treaty. All that I wish to insist upon is, that the defendant, being in Peru, was under the protection of its laws and could only be legally removed by virtue of the law of that State, and of course, the treaty made between the United States and that country, was the law of that State. Certain steps were taken on the part of the government of the United States, at the request of the executive of this State, to procure the extradition of the defendant from Peru to Illinois, where the offenses were committed. Accordingly the requisition under the law was made by the executive of the United States, upon the authorities of Peru, for the return of Ker.

Owing to some cause, which is not stated in the petition, the steps pointed out in the law were not taken; a demand seems not to have been made

upon the authorities of Peru; but the defendant was seized, it may be conceded, without any authority on the part of the United States, and without any consent on the part of Peru, by private persons; he was placed on board of the United States ship Essex, in a port of Peru, transferred to the Sandwich Islands, and thence to San Francisco, within the territory of the United States. For the purpose of placing him under the authority of the law of the United States if he came within the State of California, a requisition from the Governor of Illinois upon the Governor of California was made and a warrant issued by the Governor of that State. It is said, and I suppose it is uncontroverted, that at the time this process was given by the Governor of California, the defendant was not within the territory, and so was not subject to the process or authority of the executive of that State. However this may be, in the same manner it may be admitted that he was taken in Peru and under the same authority, no more and no less, he was taken to San Francisco, to Illinois, and to the county of Cook, where the offenses were committed. When brought here there had been a process issued from a competent court on an indictment found in that court against him for the offenses which it was alleged he had committed, and under that process he has been taken into custody, and now, it is claimed, he should be released because of the circumstances connected with his arrest and capture in Peru, and his transfer from that country to the United States. It is claimed that this vitiates—what otherwise would be legal—the process under which the arrest had taken place and he is now held in custody.

The question is, whether this is so in point of law. It is said that while in Peru he was under the protection of the treaty which had been made between the United States and Peru, and that his seizure and transfer were a violation of the treaty stipulations between the United States and Peru. This is only true in a qualified sense. While in Peru he was not under the protection of the laws of the United States, but of the laws of Peru, and if he was taken contrary to the provisions of the treaty between the two countries, he was taken in violation of the laws of Peru; but in one sense it may be said he does not come within the protection of the treaty between the United States and Peru. That treaty does not guarantee protection to all citizens of the United States who may be within the territory of Peru. It is the laws of Peru that protect the citizens of the United States who may for the time be domiciled in or inhabiting Peru. So that it can hardly be said, in the ordinary sense of the language used, that he was under the protection of the treaty between Peru and the United States. True, he could not, it may be, be legally transferred from one State to the other, except in the mode pointed out by the treaty, unless there was some law of Peru which authorized it to be done. If the act so done was against the laws of Peru, for that violation the party has his remedy under the laws of Peru, enforceable here or elsewhere, and not, properly speaking, under the laws of the United States.

The United States, by this treaty, does not guarantee it will protect every citizen or inhabitant of Peru that may come to the United States. If a Peruvian here has a trespass committed against him, he has his remedy under our laws; so it is in Peru; while the citizen of the United States is there, he is under the protection of its laws. While this, I think, is true, still I am willing to admit there is force in the view taken by the counsel for the defendant in this case. Our judgment and our feelings naturally rebel against an act done in the manner in which this was done, as stated in the petition, namely, by a person without authority of law, without any process, seizing one claimed to have fled from justice and taken refuge in Peru, and bringing him to the United States, thus committing what is claimed to be an outrage upon personal rights and personal liberty; and we naturally desire in all proper cases, to give protection to the party who has thus been outraged, and when he asks for it, to give him adequate compensation for the wrong that has been done. The question is, is that this case? The real question is, whether, because of this private wrong that has been done in taking possession of the person of the defendant, to be brought to the State of Illinois, that vitiates and destroys the process that has been issued from a competent court, for the offense or offenses charged against the defendant so as to prevent his arrest? In view of the authorities which have been cited on the argument, I can not say that the case is so clear as to authorize the court to issue the writ; or, if it were issued and served, to discharge him from custody on this account. The consequences of the discharge are so very serious, that the court may well pause before reaching this conclusion; because the result would be that the defendant might escape from all trial for these offenses. Once left at liberty, of course he necessarily would evade trial, unless he remain here until this protection is withdrawn from him; and if he escapes from it, as he has already tried to do, because he was once captured, it does not follow that he will be captured a second time.

It seems to me that it is not competent for the court to look into the circumstances under which the capture was made, and the transfer of the defendant from Peru to the United States, in order to free him from the consequences of the lawful processes which have been served upon him for the offense or offenses which he has actually committed within the county of Cook, and State of Illinois.

The only cases which have been cited which seem to have some bearing upon the question involved here are those which have arisen in cases where parties have been transferred from a foreign country to the United States, where treaties have existed under which the extradition of the party was made from a foreign country to the

United States for the commission of a particular offense. Some have held, and such seems to be the opinion of Mr. Spear, who has written a work on the law of extradition, that where a party has been arrested, under the authority of a treaty, in a foreign county and transferred to this country for the commission of an offense here, that he can not be tried for a different offense. Perhaps it may be said the weight of authority is in accordance with that view. But that case is not this. Here, though certain measures were taken by which to transfer the defendant from Peru to this country, yet they were never carried into effect, the final steps, in other words, were not taken; although the writ or authority was issued it was not executed as required by its terms, and it may be said that the parties took the law into their own hands, throwing aside the writ or process which had been issued, and which was in the hands of one of the parties, who thus committed violence upon the defendant's rights. Here, therefore, the defendant had not been taken under the authority of law, and in pursuance of the terms of a treaty between the United States and a foreign country, from that country to this. He has been taken, I repeat, simply by what we may call physical force, by those having him in custody. The government has not interfered at all. It has been done under the law of stronger, and not under written, or statute or common law.

So that this case is not within those decisions, while it clearly is within the authority of other decisions which were cited on the argument. As I have said, if I were clear in the view that this defendant should be released I would issue the writ and discharge him; it is because I am not clear that I decline to issue the writ, the consequence of which would be his discharge; in other words, I am not satisfied that he ought to be discharged from custody.

I am the more inclined to this view because in point of fact by this decision the defendant does not lose the protection of the treaty, if he is entitled to it; for he can set it up in the indictments which have been found against him, and the process which has been issued thereon from the State court, and he can take the opinion of the Supreme Court of the United States upon the question if he is entitled to the immunity he claims under the treaty from the United States to Peru after the case has passed through the various courts of the State. Or he can, if he chooses, go to the Supreme Court of the United States and apply for a writ of *habeas corpus*, and if he is entitled to the immunity he claims, that court can give him the protection of the treaty. So that in deciding the the case in this way I do not deprive him ultimately of any remedy which he has under the treaty between Peru and the United States; and I may add, that in view of the conflict between some of the State courts and some of the inferior courts of the United States upon this subject it is very desirable that this question, confessedly of the greatest importance, and now occasionally arising, should be decided by the Supreme Court of the United States. So that, not being satisfied that the defendant is now entitled to be discharged from the force and operation of the writs which have been issued against him, I shall not direct the writ of *habeas corpus* to issue, because if it were issued and served upon him I should not feel myself, as at present advised, at liberty to release him from custody.

CONTRACT — NOVATION — ACTION FOR SERVICES RENDERED THIRD PERSONS.

CANNEY v. SOUTH PACIFIC R. CO.

Supreme Court of California, June 15, 1883.

The plaintiff, a physician, was, at the instance and request of certain parties wounded by a railroad accident, attending them when the president of the railroad company (though not in the presence of the physician) told the wounded persons to employ whatever physician they chose, and the company would pay the bills. This was conveyed to the plaintiff; but he testified that he attended the wounded until their recovery, in pursuance of the original calling: *Held*, in an action against the company upon contract for services performed, that there was no mutuality by consent between them, and no liability attached to the railroad company for the services performed by the plaintiff to the persons who employed him.

Appeal from the Superior Court, San Francisco.

J. H. Barham and *Garber, Thornton & Bishop*, for appellant; *E. McClure*, for respondent.

McKEE, J., delivered the opinion of the court:

The action in this case was brought to recover the balance of an alleged indebtedness for services rendered by the plaintiff, as a physician and surgeon, at the alleged special instance and request of the defendant. Part of the services, included in the statement of the cause of action, were rendered at the instance and request of the defendant, and were paid. The contention is as to the services which were rendered to a number of persons who had been injured, on the 23d of May, 1880, by a railroad accident on the line of the defendant's road, in the county of Santa Cruz. It is for these that plaintiff seeks to make the defendant liable.

But at the trial the plaintiff was sworn as a witness in his own behalf, and he testified as follows: "On the morning of the 24th of May, 1880, I was called by the wife of one of the persons injured to treat her husband, and on that day I was called by eleven of said injured parties to treat them. I attended upon them, in pursuance of my original calling, from that time until they were all recovered. My services were reasonably worth $11,000." According to that testimony the services were rendered by the plaintiff upon an employment between him and the persons injured. That contract fixed the rights and liabilities of the parties to it. The persons for whose

benefit and at whose instance and request the services were rendered were bound to pay for them. No other or different contract could be implied. Of course, the parties to the contract might have wholly freed themselves from their rights and liabilities under it by a discharge of the contract. A contract may be discharged or put an end to at any time, by mutual consent, or by an alteration in its terms which, in effect, substitutes for it a new arrangement between the parties themselves or between one of them and a third party. Sec. 1531 C. C. And it is claimed that, while the plaintiff was engaged in performing the services under his original employment, the defendent informed the plaintiff that the injured were allowed to select any physician they saw proper, and defendant would be responsible for the indebtedness.

Yet, as a witness, the plaintiff admitted that no new promise about the services had been made to him. The only thing upon which he relies is, that the president of the railroad company "said to the injured parties," after they had employed the plaintiff, "that they should employ whatever physician they saw proper and the defendant would pay the bills." But that was not said to the plaintiff, nor was he present when it was said. It appears that the parties to whom it was said communicated it the plaintiff: but neither the promise to them, nor the communication of that promise to the plaintiff, constituted a contract between the defendant and the plaintiff, either as accessory or by way of novation, to his original employment, which he was engaged in performing. The plaintiff had no communication from or with the defendant upon the subject; there was therefore no mutuality of consent between them, and in law, however it might be in morals, no liability attached to the defendant for the services of the plaintiff to the persons who employed him.

It is not necessary to decide whether the promise made by the president of the company to the wounded, constituted a contract between them, collectively or individually, and the company, which might be enforced for the benefit of the plaintiff. No such claim seems to have been made or transferred by any of them to the plaintiff, nor is the plaintiff's cause of action founded upon such a claim. Trenor v. C. P. R. R. Company, (50 Cal. 222) is not applicable to the case in hand. That, it is true, was also a case for the services of a physician and surgeon rendered to persons wounded by a railroad accident; but there was, in the case, some evidence tending to show that the services were rendered at the instance and request of the defendant, and the case was decided upon a conflict of evidence. But in the case in hand there was no conflict of evidence. The plaintiff in his testimony and on the trial, admitted, and his witnesses proved, that the services were rendered in pursuance of his original employment by those who were wounded, and not otherwise. There was, therefore, no contract express or implied, between the plaintiff and the defendant in relation to the services which are the subject of the suit, and as there is no prejudicial error in the record, the judgment and order are affirmed.

We concur: McKinstry, J., Ross, J.

SERVITUDES— TITLE UNDER FORECLOSURE.

EPISCOPAL CHURCH v. MACK.*

New York Court of Appeals.

The plaintiff brought this action to restrain defendants from putting up a building upon land adjoining the church edifice, which would exclude the light from the church windows on that side. It appeared that plaintiff had sold this land to defendant Mack under an agreement that the use of light from all openings on that side should be reserved for use of plaintiff. Mack, who had assumed the payment of a mortgage previously existing upon the property, conveyed the land, through a third person, to his wife, subject to that mortgage, but without any liability for its payment assumed by her. Upon its foreclosure she became the purchaser and took the deed. *Held*, that that vested in her, under the statute provision, the title of the mortgagor and mortgagee, unaffected by the intermediate acts of the mortgagor and those succeeding to his interest, and therefore the sale and conveyance to her under the mortgage relieved the property from the restrictions subject to which the plaintiff conveyed it to her husband.

E. C. Boardman, for appellant; *Wheeler H. Peckham*, for respondent.

FINCH, J., delivered the opinion of the court:

It is conceded that a purchase under the foreclosure of the Bell mortgage would have given to a stranger to the title an ownership discharged of the plaintiff's easement. That the same result attends the purchase by Mrs. Mack, notwithstanding her relations to the property, follows from the reason upon which the conceded rule is founded. The statute provides that the deed given in pursuance of a sale on foreclosure shall vest in the purchaser "the same estate (and no other) that would have vested in the mortgagee if the equity of redemption had been foreclosed;" and further declares that such deed shall be as valid as if executed by the mortgagor and mortgagee.

The construction to be put upon these two provisions was early settled in this court. Brainard v. Cooper, 10 N. Y. 358; Packer v. Rochester, etc. R. Co., 17 Id. 287. In the last of these cases it was said that where legal title was concerned, a mortgage, which for many other purposes is a mere chose in action, is a conveyance of the land; that the interest remaining in the mortgagor is an equity; and that the foreclosure cuts off and extinguishes that equity and leaves the title conveyed by the mortgage. It was added that such was precisely the effect of a strict foreclosure, and

* Reversing the decision of the Supreme Court in the same case, 13 Cent. L. J. 453.

that in construing the statute, its two clauses were to be read in harmony. It was therefore decided that when the act says the master's deed "shall have the same validity as if executed by the mortgagor, it is not to be taken that the purchaser is to be considered as holding under the mortgagor by title subsequent to the mortgage, in a sense which would subject him to the effect of the mortgagor's acts intermediate the mortgage and the foreclosure." While it is clearly the modern doctrine that the mortgagor has, by virtue of his mortgage, no estate in or title to the land, or the right of possession before or after the mortgage debt becomes due (Ten Eyck v. Craig, 62 N. Y. 421), and only acquires such title by purchase upon the foreclosure sale, yet the character and extent of his title so acquired is described in the statute by a reference to the old rule and the old practice, when the mortgagor's right could be fitly termed an equity of redemption which could be foreclosed, leaving an absolute estate in the mortgagee. The effect of the foreclosure deed, therefore, as determined by the statute, is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee, as it existed at the date of the mortgage and unaffected by the subsequent incumbrances and conveyances of the mortgagor. And thus, while the plaintiff corporation held title to the Mack lot, they held it subject to the Bell mortgage and to the absolute title into which that mortgage might ripen by a foreclosure and sale. When they sold to Mack, reserving an easement in the lot for light and air to their adjoining windows, they held their easement and Mack held his ownership, still subject to the Bell mortgage and the absolute title into which it might be turned. Mack had assumed the payment of the Bell mortgage, but conveyed through a third person to his wife, subject to that mortgage, but without any liability for its payment assumed by her. Upon its foreclosure she became the purchaser and took the deed. That vested in her, under the statute provision, the title of the mortgagor and mortgagee, unaffected by the intermediate acts of the mortgagor and those succeeding to his interest, unless there be something in her position which subjects her to a different rule. The statute allowed her to be a purchaser, and, in determining the effect of the foreclosure deed, it draws no distinction among purchasers. It does not discriminate. Whoever may lawfully purchase becomes the purchaser, whose title is described and determined. We have no warrant in the facts to take her out of the statutory protection.

The argument of the General Term and of the learned counsel for the respondent on this appeal, were both aimed at the result of converting Mrs. Mack's purchase into a mere payment and discharge of the mortgage lien, and her deed into a release of the incumbrance. The General Term reached the result by a disregard of the first clause of the statute declaring the effect of the deed, and what seems to us a misrepresentation of the second clause. In brief, the reasoning was that the deed was to be equivalent to one made by the mortgagor and mortgagee; that the mortgagor had already conveyed, and his title incumbered by an after constituted easement had reached Mrs. Mack; that she could not be said to purchase what she had already had; that so her deed was only equivalent to one made by the mortgagee, and he having no title, but merely a lien, the foreclosure deed operated only as a release to Mrs. Mack, however it might operate as to a stranger. We deem this reasoning defective in two respects. It construes the statute to transfer the mortgagor's title as it stood, not at the date of his mortgage, but burdened with its after incumbrances and limitations imposed by him or his grantees; and it assumes what is not true, that Mrs. Mack already had the entire title of the mortgagor, and so could take nothing from him, but only the right of the mortgagee. The mortgagor had the absolute title, incumbered only by the mortgage; that title he transferred to the church, but when the latter conveyed to Mack, it reserved an easement or servitude, and so parted with less than it received from the mortgagor. This title Mrs. Mack took, and therefore did not get the entire interest which the mortgagor himself had. There is something which she had not got, which by a foreclosure of the Bell mortgage would pass, and which it was impossible for her to purchase.

A further ground is stated which is based upon a theory that Mrs. Mack, by virtue of her ownership of the lot, came under some obligation to pay off the mortgage, and so could not in equity assert a title founded upon a breach of that obligation. Cases are cited in other States which hold that the mortgagor owes to his mortgagee the duty of paying taxes upon the land, and cannot, by neglecting their payment and causing a sale, and then becoming a purchaser, cut off the lien of the mortgagee. If the purchase had been made by Mrs. Mack, who had assumed the payment of the mortgage, the question would have arisen. But Mrs. Mack owed no duty of payment either to the mortgagee or to the plaintiff. She assumed no such obligation. She violated no personal liability by omitting to pay off the incumbrances. It was her right and privilege not to do so, and in the omission she did no wrong of which either party could lawfully complain. She had the right to leave the mortgagee to his remedy, and when he asserted it the law allowed her to become the purchaser, and made no distinction between her rights and those of a stranger to the title.

It was urged that this view of the case left the plaintiff without any power to save its easement, since on the sale Mrs. Mack could safely outbid all others and beyond the mortgage debt. But the plaintiff should not have waited until the sale. When brought into court as a defendant and certain to be bound by the decree it should have sought to modify the decree, and showing the

peril of its easements and offering to bid the full amont of the mortgage debt and costs upon a sale subject to the servitude, it should have asked that the sale be so made. The mortgagee could not object since his debt would be paid in full, and he had no greater right; and Mrs. Mack could have asserted no equity to have the sale so made as to free her from the easement. But when no limitation or condition is imposed by the decree and no duty of payments rests on the purchaser, the statute determines the estate which passes by the foreclosure deed.

The judgment of the General Term should be reversed, and that of the Special Term affirmed, with costs.

All concur.

VOLUNTARY PAYMENT — PROTEST — PAYMENT OF TAXES.

UNION INS. CO. v. CITY OF ALLEGHENY.

Supreme Court of Pennsylvania.

1. A payment of taxes is not compulsory because made under threat, express or implied, that the legal remedy will be resorted to for their collection.

2. The payment of taxes under protest to prevent the sale of land where an alias *fi. fa.* has issued on a judgment which is not a lien, and the lands have been advertised for sale, is a voluntary payment and can not be recovered back.

Error to the Common Pleas No. 1, of Allegheny county.

Assumpsit, by the Union Insurance Company against the city of Allegheny, to recover the amount of certain taxes paid by the company to the city upon two different occasions, under protest, and upon an alleged illegal demand.

Trial by jury being waived, the case was tried before Stowe, P. J., who found the facts to be as follows: William A. Logan, being the owner of property in the city of Allegheny, gave a mortgage, dated August 28, 1874, to the Union Insurance Co., in the sum of $4000. Subsequently a *scire facias* was issued and judgment obtained thereon, and upon an *alias lev. fa.*, with notice, etc., the property was sold to the plaintiff for the sum of $50, and a deed duly executed by the sheriff July 21, 1877. Previous to the sale taxes had been assessed on this property for the years 1875 and 1876. Municipal claims were filed for each year's taxes in March, 1878, under sec. 6, of the act of April 14, 1863 (P. L. 434), which provides that such claims shall become judgments when filed with the prothonotary, and execution may issue forthwith and a sale be made of the real estate.

In the case of the assessment and claim filed for the year 1875 an *alias fi. fa.* was issued in June, 1878, and the real estate advertised for sale for Monday, July 1, 1878. On June 29, 1878, plaintiff paid the taxes and costs to the solicitor for Allegheny city under protest.

In the case of the claim filed for the taxes of 1876, the city having threatened to levy upon and sell the property, plaintiff paid the taxes, cost, etc., to the solicitor for Allegheny, under protest, without *fi. fa.*

Defendant presented the following points: 1. That under all the evidence in the case plaintiff is not entitled to recover. Affirmed. 2. That as regards the amount paid for taxes for 1876 such payment was voluntary and cannot be recovered back. Affirmed.

Judgment was entered for defendant. Plaintiff thereupon took this writ assigning for error, *inter alia*, the affirmance of the above points and the entry of judgment for the defendant.

Thos. C. Lazear, for plaintiff in error, *Wm. B. Rodgers*, for defendant in error.

MERCUR, J., delivered the opinion of the court:

This suit was to recover money paid by the plaintiff under the following circumstances: One Logan owned certain lands in the City of Allegheny, and in August, 1874, executed a mortgage thereon to the plaintiff in the sum of $4,000. The latter obtained judgment, issued execution, sold the property at sheriff's sale, bid it in for $50, and obtained a deed therefor in July, 1877.

Municipal taxes had been assessed on the property for the years 1875 and 1876, which could not be collected for want of goods and chattels on which to levy. In March, 1878, claims for these taxes were filed in the prothonotary's office under the Act of July 14, 1863, which provides for the entry of judgment thereon, the issuing of execution forthwith, and a sale of the real estate. Execution had issued on one of the judgments thus obtained, the real estate then owned by the plaintiff was levied on, and advertised to be sold. The plaintiff paid the judgment under protest. A year thereafter the city solicitor demanded of the plaintiff payment of the other judgment for the taxes of 1876, with threat that unless paid he would proceed to enforce payment by sale of its property. The plaintiff thereupon paid this judgment under protest. This action is to recover the sums thus paid for the taxes, interest and costs covered by both judgments.

It is conceded now that the lien of these taxes was discharged by the sheriff's sale of the property made in 1877. The filing of the claims the year thereafter created no lien on the property. Does the fact that they were paid under protest, when they were no lien, to prevent the form of sale being had, give a right to recover the sums so paid?

It is well settled as a general rule of law, that money voluntarily paid on a claim of right where there has been no mistake of fact, can not be recovered back on the ground that the party supposed he was bound in law to pay it, when in truth he was not. Clarke v. Dutcher, 9 Cow. 674. He shall not be permitted to allege his ignorance of the law, and it shall be considered a voluntary

payment. Id. In Brisbane v. Dacres, 5 Taunt. 144, Mr. Justice Gibbs said where a man demands money of another as a matter of right, and he pays it with a full knowledge of the facts on which the demand is founded, he can never recover back the sum he has so voluntarily paid. The same principle is ruled in Mowatt v. Wright, 1 Wend. 355, and Lyon v. Richmond, 2 Johns. Ch. 51. Mr. Chief Justice Waite, in pronouncing the judgment of the court in Railroad Co. v. Commissioners, 8 Otto, 541, which was a suit to recover back taxes which the company had paid, declared it to be a rule of the common law, that "where a party pays an illegal demand with a full knowledge of all the facts which renders such demand illegal, without immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and can not be recovered. And the fact that the party at the time of making the payment files a written protest, does not make the payment involuntary." He evidently referred to personal property of which the owner might summarily be dispossessed.

In Colwell v. Peden, 3 Watts, 327, it was held that assumpsit would not lie against a landlord for money paid by a tenant, after a warrant of distress had issued in good faith to recover rent alleged to be in arrear, although in fact no rent was actually due. It was there argued that the payment was not voluntary, that the tenant must either pay or have his furniture sold; yet the court held that the tenant could not recover by reason of there being no rent due. He might have maintained either trespass or replevin. Espy v. Allison, 9 Id. 462, was the case of a purchaser of land at sheriff's sale, who, under the impression that he was liable to pay a bond secured by mortgage on the property purchased, paid the same, and afterwards discovered that he was not bound to pay it by reason of the mortgage having previously been satisfied of record, it was held he could not recover the money back, as the holder of the bond had conscientiously received the same. In Boas v. Updegrove, 5 Barr, 516, an execution had issued on a judgment against the former owner of the land, to sell it. The terre-tenant, supposing the judgment to still be a lien on the land, after it was advertised for sale, paid the money to the sheriff, who returned the writ "money made by" the terre-tenant. Before the return day of the writ, the latter ruled the money into court, and proved that the judgment was no lien, and that he had paid it under a mistake. It was held to be a voluntary payment which the terre-tenant could not recover back, and that the plaintiff in the execution was entitled to the money. It was said to be money which the creditor might conscionably receive, and which he might conscionably retain. In Taylor v. Board of Health, 7 Casey, 73, it was held that a payment of taxes is not compulsory because made under a threat, express or implied, that the legal remedies for its collection will be resorted to. It is there said: "We state the case as one of a voluntary payment of taxes because there is no pretence that the defendants' officers did any more than demand the tax under a supposed authority of the law; and this is no more a compulsion than when an individual demands a supposed right."

Again in Real Estate Savings Institution v. Linder (24 P. F. Smith, 371), it was held that one who voluntarily pays money with knowledge or means of knowledge of the facts, and without fraud on him, cannot recover it back because he paid it in ignorance of the law. In Dillon on Municipal Corporations (sec. 751), the requisites to maintain an action *ex contractu* against a municipal corporation to recover back money paid to it for taxes are said to be three. 1st. The authority to levy the tax must be wholly wanting or the tax itself wholly unauthorized, so that the tax is absolutely void. 2d. The money sued for must have been actually received by the defendant corporation, for its own use. 3d. The payment by the plaintiff must have been made upon compulsion to prevent the immediate seizure of his goods or the arrest of the person and not voluntarily. "Unless these conditions concur payment under protest will not give a right of recovery."

No authority is found which holds that money paid to prevent the sale of lands, under a threat to sell the same on a judgment which is not a lien thereon, can be recovered back, by reason thereof.

Then to refer to the facts in this case we find no allegation that the taxes were illegally laid, no averment or irregularity in making the assessment or in laying the taxes. The city had undoubted jurisdiction and power, and all the forms of the law were complied with. The only alleged wrong consists in the attempt to collect the taxes by proceedings against the land after it ceased to be liable for the payment thereof.

At the time the taxes were paid each party was fully informed of all the facts bearing on the case. The plaintiff knew these then as well as now. They were all of record, and most of them in the direct line of its title. It knew when the mortgage was executed. It knew the time when it purchased the property at sheriff's sale. The claims filed showed on their face that they were for taxes laid after the execution of the mortgage, and for years prior to the sheriff's sale. The only question about which the parties could possibly differ was one of law. That was, whether under the well known and undisputed facts the lien of the taxes was divested. The city proposed to test it in a regular legal form. They had been duly laid, they had never been paid to the city. The property did not sell for enough to pay them if it had claimed and obtained the whole fund produced by the sale. They remained unsatisfied against Logan. There was nothing inequitable or unconscionable in the city's acceptance of the taxes and in retaining them.

It is said the plaintiff had not had its day in

court; true it had not. The taxes were not laid against it, nor its property.

It did not propose to attack the validity of the assessment. In several of the cases cited the party had had no day in court, no hearing or opportunity of being heard; yet he might have had it before making payment, by appropriate action. Failing to avail himself of it, he waived his rights. So here by application to the equitable powers of the court by bill in equity, execution might have been stayed, and the claim removed from the record. No immediate and urgent necessity existed for the payment of the taxes to protect the property of the plaintiff. Its goods were not about to be seized, the execution could not take from it the possession of the land; nor could a sale, if made, have had such effect. It follows that all the facts in the case are clearly insufficient to enable the plaintiff to maintain his action, and the learned judge was correct in so holding.

Judgment affirmed.

SHARSWOOD, C. J., and GORDON and TRUNKEY, JJ., dissented.

EQUITY—MERCHANTS' EXCHANGE MEMBERSHIP—CREDITORS' BILL.

ELIOT v. MERCHANTS' EXCHANGE OF ST. LOUIS, AND GEORGE L. SCHEIFERDECKER.

St. Louis Court of Appeals, October 23, 1883.

A membership in the Merchants' Exchange of St. Louis is property, and while not subject to the ordinary process of execution against an insolvent owner, may be reached by a creditor's bill in equity and subjected to the payment of debts.

Geo. W. Taussig & D. Goldsmith, for plaintiff; *Overall & Judson* and *Broadhead & Hauessler*, for defendants.

Appeal from the Circuit Court of the City of St. Louis.

BAKEWELL, J., delivered the opinion of the court:

This was a proceeding by a judgment-creditor of defendant Scheiferdecker to expose for sale, in satisfaction of plaintiff's judgment, a certificate of membership of Scheiferdecker in the Merchants' Exchange of St. Louis.

On hearing, the circuit court made a decree that plaintiff is entitled to subject a certificate of membership, No. 2394, issued by said exchange to said Scheiferdecker, to sale in satisfaction of plaintiff's demand, and directing the defendants to deliver the certificate to the sheriff, and directing the sheriff to advertise and sell the same in the manner provided by law for making sales, under execution, of personalty, and to apply the proceeds to the payment of plaintiff's demand, which is ascertained to be $16,701.19. Defendants are also enjoined from transferring the certificate otherwise than specified in the order of court, which further directs Scheiferdecker, within five days of the sale of the certificate, to execute an assignment to the purchaser, according to the form of the certificate indorsed thereupon.

On the hearing, certain acts of the legislature and rules of the Merchants' Exchange were offered in evidence. They are not copied into the bill of exceptions, but the bill stipulates that the counsel may, in this court, introduce a certain book of the rules of the exchange, which was introduced on the hearing below, and which contains all these documents. This book does not appear to be filed with the transcript, nor have we seen it. But there seems to be no dispute about its contents, and for the purpose of this opinion we shall assume that these acts and rules, so far as needed, are correctly set forth in the briefs of counsel.

It appears from the pleadings and evidence that plaintiff is the assignee of a judgment rendered in December, 1876, in the St. Louis Circuit Court against Scheiferdecker for $10,666.74, which is unpaid, and that Scheiferdecker has no property subject to execution, if his membership in the exchange be left out of question. Scheiferdecker is, and since 1873, has been a member in good standing of the Merchants' Exchange of St. Louis. His dues are paid. A certificate of membership in the exchange has been duly issued to him, and is in the hands of the secretary of the exchange for delivery to him. This certificate, No. 2394, is sealed with the seal of the exchange, signed by its president and secretary, and sets forth that Scheiferdecker is, on the date named, (January 3, 1882,) a member of the exchange in regular standing; that the membership is subject to annual assessments, and is transferable on payment of all assessments, and a transfer fee of five dollars, on the books of the corporation to any person approved by the board of directors on surrender of the certificate. The transfer is to be made according to a form indorsed on the certificate which purports to transfer the membership, subject to the rules of the exchange, provided the membership is not found to be forfeited or unpaid. The members of the exchange have the privilege of admission to its floor to transact business, the right of taking part in and voting at all deliberations of the exchange, and the benefits of its market reports and other information. Scheiferdecker is a commission merchant. He was a member before any rule was adopted authorizing transfer of memberships. He paid for his membership an initiation fee of ten dollars and an assessment of twenty-five dollars. The exchange holds three daily sessions. Its transactions embrace nearly all business in certain lines, specially breadstuff and provisions. There were at the date of the hearing 3,565 members of the exchange. The market reports from Liverpool and from the leading American cities are daily posted on the bulletin of the exchange. The rev-

enue of the exchange is from assessments of its members—$20 from each member per year; rent of chairs, $600; rent of telegraph counters $800, and interest on Government bonds owned by the exchange, which last year amounted to $10,000. The income exceeds the expenditure, and the surplus goes to the reserve fund, which is about $350,000. The market value of certificates of membership varies. The highest value during the year preceding April, 1882, was $525, and their lowest $215. The average attendance on 'Change is about 1,200 persons. The business of commission merchants requires them to attend almost daily.

The Merchants' Exchange of St. Louis was originally a voluntary association, the objects of which, as expressed in the preamble, were to promote the manufacturing and commercial interests of St. Louis, inculcate just principles of trade, maintain uniformity of commercial usages, acquire, preserve and disseminate business information, and adjust controversies between merchants. It was incorporated in 1863, and the charter was amended in 1865, and again in 1875. It has power to receive and hold and dispose of real and personal property. It is admitted that the privileges of membership are by the rules such as are common to mercantile organizations of similar character. Under Rule X new members are admitted upon written application with references as to business character and standing, and only on a favorable report of the committee on membership and the approval of the board of directors. The members may be suspended or expelled for violation of the rules of the exchange. Before January, 1882, there was no provision for transfer of memberships, and every new member had to pay an initiation fee for himself whether an old member was retiring or not. On January 1, 1882, and before the commencement of the present proceedings, a rule was adopted, to the effect that "members of the exchange, on and after this date, shall be entitled to certificates of membership, which shall be transferable on payment of all assessments due and a transfer fee of five dollars, subject, however, to the recommendation of the committee on membership and the approval of the board of directors.

The question presented by the record is one that has arisen of late years, and as to which the authorities are not in accord. It is whether the seat of a member of a merchants' exchange, such as is established in the large centers of commerce, and having a constitution and rules such as usually govern these exchanges and stock exchanges in America, is a specie of property which if not subject to execution by the ordinary process without the intervention of equity, may, by proper proceedings on the part of a judgment-creditor, be subjected to sale, and the proceeds applied toward the satisfaction of the judgment, the debtor being compelled to make the transfer and the exchange to ratify it, in accordance with its rules in other cases.

The question seems to have been first considered in the District Court for the Northern District of Illinois, on argument of a motion for a rule on a bankrupt, a member of the Chicago Board of Trade, that he assign and transfer to the assignee his certificate of membership in the board. *In re* Sutherland, 6 Biss. 526. The Board of Trade in that case was incorporated. Its objects were similar to those of the Merchants' Exchange of which the defendant in the case at bar is a member. As in the present case, membership conferred no pecuniary profit upon the members, except what was derived from the incidental use made of his privilege of membership by the member. Persons were admitted to membership by ballot—a vote of two-thirds being required to elect—and were liable to expulsion for a violation of the rules or dishonorable conduct. The admission was $1,000. A member in good standing might transfer his certificate to any person elegible, after ten days' notice, approved by a vote of two-thirds of the directors. The selling value of the membership was $500, where buyer and seller could comply with the conditions. It was held that this membership confers no property right, represents no interest in property, and conferred privileges similar only to those given by membership of a club or lodge. As the certificate conferred nothing that the assignee could use, except by consent of others, in the absence of authority and from these supposed analogies, the learned judge determined that the bankrupt's membership can not be treated as a portion of his assets, or pass to his assignee, and the motion was denied.

In the same year the case of Hyde v. Wood was decided by the Supreme Court of the United States. 94 U. S. 523. The case was this: The San Francisco Stock and Exchange Board was a voluntary association, whose objects are expressed by its name. The members were elected by ballot and limited in number. The constitution provided that a member, on failing to perform his contracts, or becoming insolvent, may assign his seat to be sold and the proceeds, to the exclusion of his outside creditors, shall be first applied for the benefit of members to whom he was indebted; the purchaser does not become a member until elected by ballot. It was held that this provision is not contrary to public policy, or to the Bankaupt Act. Judge Miller, in delivering the opinion of the court, says: "There can be no doubt that the incorporal right which Fenn had to this seat when he became bankrupt was property, and the sum realized by the assignee" ($10,000) "from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that if he had made no such assignment it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy; and that if there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee."

Following this case it was held, in 1877, by the New York Superior Court, Special Term (Rittenhouse v. Baggett, 4 Abb. N. C. 67, that membership in a board or exchange, which has a money value, and is transferable, subject to the purchaser's procuring himself to be elected a member, is property, the beneficial interest in which passes to a receiver, and that the receiver may maintain an action to compel the debtor to convey to a member elect with whom the receiver may contract for its sale. The board in question was the N. Y. Cotton Exchange, an incorporated body. The initiation fee was $5,000. By a by-law the property could not be assigned to any one but a member or member elect. Other provisions were similar to those noted above in the San Francisco Stock Exchange.

Three years afterwards the same question came up for consideration in the District Court of the United States for the Southern District of New York. It was held that a seat in the New York Stock Exchange is property which passes to an assignee in bankruptcy, and the court required the bankrupt to make the transfer. The same court had recently decided (*In re* Gallagher & Lane, 19 N. B. R. 224) that a license to occupy certain stalls in a New York market, though revocable at the will of the city, and though the city refused to recognize the rights of the assignee in bankruptcy under the general assignment, passed to the assignee under the bankrupt law; and he made an order compelling the bankrupt to make a special assignment of his license. Judge Choate, in his opinion, says that the case of the seat in the Stock Exchange can not be distinguished in principle from the market license case, "as in that case," he proceeds, "the consent of the city was necessary to a transfer, so here, the consent of a committee of the Stock Exchange is necessary to a transfer of this right. The seat, however, has an actual pecuniary value, which the rules of the society, as interpreted and applied in practice, permit the holder to realize by a sale and transfer. There is no practical difficulty in effecting a transfer of this right or interest for a pecuniary consideration subject to the condition that the debts of the present holder to members are first paid; and the right or privilege is to all intents and purposes a business right or privilege, useful for business purposes only. I see nothing in the rules of the Exchange which renders it impossible for the seat to be disposed of by the assignee in bankruptcy, with the co-operation of the bankrupt, subject to the conditions above mentioned." The learned judge then cites Hyde v. Woods, *supra*, as directly in point, and says that if *In re* Sutherland, *supra*, can not be distinguished from Hyde v. Woods (which seems to be difficult), it is not to be followed; and that he is not satisfied with the reasoning in the Gallagher Case.

The next cases to be considered in chronological order are Thompson v. Adams, and Pancoast v. Gowan, reported in 93 Pa. St. 55 and 66. These cases decide that a seat in the Philadelphia Stock Exchange is not subject to levy or sale under an ordinary *fieri facias*. As to this we suppose there can be no question. The proceeds of the seat, when sold, by the rules of that Exchange, go, as was the case in Hyde v. Woods, *supra*, not to the general creditors of the bankrupt, but, first to his creditors of the Stock Exchange. Without the intervention of equity, it is difficult to see how such property could be reached. The Pennsylvania decisions do not go so far as to hold that the seat is not property, but hold that it is not property subject to ordinary process at law.

The question is carefully considered in an opinion of the Superior Court of Cook county, Illinois, per Gardner, J., reported in 21 Am. L. Reg. 408. It is there held that certificates of membership in the Board of Trade of Chicago are property, and as such, liable for the debts of the owner on a creditor's bill to subject them to the payment of his debts, and that the debtor will be restrained from disposing of his certificate of membership, and ordered to execute a blank assignment thereof to the receiver appointed in the cause. On appeal this judgment was reversed by the Supreme Court (Barclay v. Smith, 16 Cent. L. J. 437), which refers carelessly to the Pennsylvania cases cited above, and says generally that it has been referred to other cases holding a different view, but declines to review the cases, and says that it does not think they establish a correct rule, and that the Supreme Court of Illinois is not inclined to follow them.

These seem to be all the cases directly in point. To these might be added cases in which patent-rights and similar interests have been subjected in equity to the payment of judgments. There can be no doubt that the weight of authority is, that the seat of a member in a stock board or merchants' exchange, is a species of property not subject to ordinary execution, but which may be reached by equity processes in such a way as to respect the rules of the Exchange and the rights of all parties interested, and at the same time by proceedings in aid of the execution, to compel an insolvent member to transfer his seat under the rules of the board, and apply the proceeds to the satisfaction of the debt of his judgment creditor. And this seems to be the view which has the strongest arguments in support of it. The law upon the subject, as deduced from an attempt to reconcile the cases with a view to the facts and circumstances of each case, seems to be well set out by a recent text-writer, whose treatise on Stock Brokers and Stock Exchanges is a valuable contribution to the learning of the profession upon a subject as to which nothing of importance had hitherto been done towards collecting and reviewing the decisions upon the subject, scattered through the volumes of reports in England and at home. Dos Passos on Stock Brokers, 96.

We are of opinion that the decree of the circuit court should be affirmed, and that no objection can be reasonably made to the sale by the sheriff

under the decree, acting under the order of the court in a proceeding such as the one before us, to which the Exchange as well as the insolvent member whose certificate is to be sold, are both parties.

With the concurrence of all the judges, the judgment is affirmed.

WEEKLY DIGEST OF RECENT CASES.

1. CONTEMPT—HABEAS CORPUS—JURISDICTION.

A court can not, in a *habeas corpus* proceeding, review an order for imprisonment for contempt, and reverse, unless the act constituting the alleged contempt was such that it can pronounce as a matter of law, that the act was not contempt. *State v. Leaton*, S. C. Iowa, Oct. 3, 1883, 13 N. W. Rep. 736.

2. CONTRACT—CONSIDERATION—NUDUM PACTUM—INSURANCE AGENT.

An agreement by an insurance agent with a customer to effect insurance on his property, is not a contract for the breach of which an action will lie; such breach is a mere *non-feasance* of an executory contract which was *nudum pactum*. A had for some years effected his insurance through B, an insurance agent, but had discontinued it for some months on account of dissatisfaction with an increase of rates proposed to be charged; he subsequently directed B to renew the expired policies, and B agreed to do so. B did not effect the renewals, and the property was burned down within a month. In an action by A against B to recover damages for the latter's failure to renew the policies: *Held*, that he was not entitled to recover. *Fanenthal v. Derr*, S. C. Pa., Oct. 1, 1883; 13 W. N. C., 485.

3. CORPORATIONS—CORPORATE ELECTIONS—VOTING BY PROXY.

The right to vote by proxy at a corporate election of officers does not exist unless expressly conferred on the members of the corporation by the charter, or by a by-law of the corporation. *Commonwealth v. Bringhurst*, S. C. Pa., April 16, 1883; 13 W. N. C. 483.

4. CRIMINAL LAW—MURDER—SELF-DEFENSE—EVIDENCE.

In a prosecution for murder, where self-defense is relied on as a justification, defendant may show the quarrelsome, overbearing and vicious character of the party killed; that he carried deadly weapons; and that he had, time and time again, abused defendant and others. *State v. Graham*, S. C. Iowa, Oct. 3, 1883; 16 N. W. Rep. 743.

5. DAMAGES—EXEMPLARY DAMAGES—EVIDENCE OF DEFENDANT'S WEALTH.

In vindictive actions, such as assault and battery, slander, libel, seduction, etc., where fraud, malice, cruelty, oppression, brutality, or wantonness is shown on part of the defendant, exemplary damages may be recovered. In the above class of actions evidence may be given of defendant's wealth. *Brown v. Evans*, U. S. C. C., D. Nev., February 5, 1883; 17 Fed. Rep. 912.

6. DAMAGES—WRONGFUL SEIZURE—MEASURE OF DAMAGES.

The measure of damages in a suit for the wrongful and unlawful seizure and conversion of goods is the value of the goods seized at the place of seizure on the day of conversion, and interest on that value. This means their value in the exact condition that they were at the time of seizure, and not what might be obtained for them if retailed in small quantities at different times, and in a different shape from that in which they were found by the party converting them. The value of liquors seized, if sold by the drink, is not a proper inquiry, and evidence thereof is inadmissible. *Tucker v. Hamlin*, S. C. Tex., Tyler Term, 1883.

7. MARRIAGE—VALIDITY—FRAUD AND DURESS.

A marriage by one under lawful arrest for seducing a minor, under promise of marriage, is not void, as obtained by fraud or duress, nor because the woman was a prostitute and over twenty-one years of age, nor because the justice demanded excessive bail, nor because, after the woman had assented to a postponement of the marriage ceremony, the minister, who was present, and the constable who had arrested complainant, and the justice who issued the warrant, advocated its immediate performance, nor because the parties did not cohabit after the ceremony. *Seyer v. Seyer*, N. J. Ch. Ct., May Term, 1883; 10 Stew. 210.

8. MORTGAGE—SALE OF MORTGAGED LAND—ASSUMPTION OF MORTGAGE DEBT—EFFECT OF EXTENSION TO PURCHASER UPON MORTGAGOR'S LIABILITY.

Generally, one purchasing land subject to mortgage, not only purchases the equity of redemption, but purchases the whole estate, and assumes the payment of the mortgage as part of the purchase money. Generally, an express agreement is made to that effect, and the deed is drawn subject to the payment of the money. In such case, as between the parties, the purchaser becomes primarily liable for the debt, and the mortgagor only security; and as between them the mortgaged property becomes the primary fund for the payment of the debt. The mortgagee may, by his dealings with the purchaser and mortgagor, recognize the purchaser as the principal and the mortgagor as only security towards himself. A purchaser having assumed the payment of an existing mortgage, and thereby become the principal debtor, and the mortgagor a surety for the debt merely, an extension of the time of payment of the mortgage by an agreement between the holder of it and the purchaser, without the concurrence of the mortgagor, discharges him from all liability upon it. *George v. Andrews*, Md. Ct. App.; Reporter's Advance Sheets.

9. NEGLIGENCE—CONTRIBUTORY—FACTS CONSTITUTING.

Plaintiff got off a cattle train at night to examine his cattle, when the train stopped for that purpose, and, not hearing the signal to start, attempted to get on a freight car, after the train had started, because he supposed, from the "lively rate" the train was moving, he would not be able to get on the "caboose," at the rear of the train, which had been provided for passengers. At the time he attempted to get on the freight car, he

had a "prod-pole" and a lantern in his hand. His foot caught in a hole caused by a defective plank in the bridge over which the train was passing, and he fell from the car and was injured. *Held*, that he was guilty of contributory negligence, and not entitled to recover. *McKorkle v. Chicago, etc. R. Co.*, S. C. Iowa, Oct. 2, 1883; 16 N. W. R., 714.

10. NEW TRIAL—ADMISSION OF IMPROPER EVIDENCE.
The fact that the judge laid down the true measure of damages in his charge, does not cure the error committed in admitting improper evidence to go to the jury. The practice of admitting improper evidence over the objections of a party, and afterwards attempting to counteract its influence by telling the jury to disregard it, is ground for reversal. *Tucker v. Hamlin*, S. C. Tex., Tyler Term, 1883.

11. SERVICE OF PROCESS—WAIVER OF OBJECTION.
The appearance of a defendant in a case pending in a State court, for the purpose of filing a petition for removal to a Federal court, does not constitute such a general appearance as operates a waiver of defective or illegal service of process, so as to prevent his raising any objection to such service after the removal. *Small v. Montgomery*, U. S. C. C., E. D. Mo., Sept. 27, 1883; 17 Fed. Rep., 865.

12. STATUTE OF FRAUDS—MEMORANDUM IN WRITING.
The following memorandum in writing, viz: "Denver, Dec. 17, 1880. Received of E the sum of twenty-five dollars, part payment for lots 1, 2, 3, in block 28, C. & E. addition to Denver. Consideration, $2,000. (Signed). M. C., by G. & Co., Agents." Is sufficient to take the contract out of the statute of frauds, and the contract imported by said memorandum will be specifically enforced. *Eppich v. Clifford*, S. C. Colorado, Spring T., 1883; 4 Col. L. Rep. 97.

13. TRIAL—IMPROPER REMARKS OF COUNSEL.
Where counsel, in the absence of the trial judge from the court-room, in argument to the jury make statements not warranted by the evidence in the case calculated to prejudice the jury against one of the parties, such unwarranted statements may be ground for a new trial, although not objected to at the time by the opposing counsel. *Hall v. Wolf*, S. C. Iowa; 16 N. W. R. 710.

14. WILL—BEQUEST FOR ACCUMULATIONS — CONSTRUCTION,
A testatrix directed her executors to sell her whole residuary estate and pay the proceeds to a trustee, who should "invest and put at interest" all moneys thus received. She further provided: "The annual interest accruing from the money thus placed at interest, after the payment of all necessary expenses, I give and bequeath to my granddaughter A, to be paid to her by my trustee on the first day of the fourth month in each and every year, after she shall arrive at the age of twenty-one years." On the attainment of said legatee of her majority: *Held*, that she was entitled to take absolutely the interest which had accumulated on said principal sum during her minority. *Penrose's Appeal*, S. C. Pa., March 12, 1883; 16 W. N. C., 446.

RECENT LEGAL LITERATURE.

SPEAR ON THE LAW OF THE FEDERAL JUDICIARY. The Law of the Federal Judiciary: A Treatise on the Provisions of the Constitution, Laws of Congress, and the Judicial Decisions Relating to the Jurisdiction of, and Practice and Pleading in the Federal Courts. By Samuel T. Spear. New York, 1883: Baker, Voorhis & Co.

This is a most excellent work and of great practical value to the practitioner in the Federal Courts. It is divided into seven parts, which treat respectively of: 1. Federal Judicial Power; 2. The Extent of Federal Judicial Power; 3. Courts of the United States; 4. Removal of Causes from State to Federal Courts; 5. Relations of State to Federal Jurisprudence; 6. Federal Jurisprudence and the Common Law; 7. Federal Equity Jurisprudence. The work is a thorough, exhaustive and practical treatise on the Jurisdiction, Practice and Pleading of the Federal Courts, and will, we think, be found of great utility. It is a large volume of nearly nine hundred pages, and is neatly and accurately printed and well bound, and altogether is calculated to make a valuable addition to the library of the Federal practitioner.

NOTES

——In Australia offenses against women are punished with much greater severity than in this country. At the Central Criminal Court in Melbourne recently, men guilty of this offense were sentenced as follows: John Johnston, two years' hard labor, the first three months to be in irons; Frederick Benjamin, two years' hard labor, two whippings of fifteen lashes each, the first three months of the second year to be in irons; Patrick Joseph Dowling, three years' hard labor, two whippings of fifteen lashes each, the first three months of the second and third years to be in irons. —*Law Times*.

——A prisoner was once tried before Baron Alderson for stealing a saw, and in his defense, urged that he only took it in a joke. "And pray, prisoner, how far might you carry it from the prosecutor's house?" asked the Judge. "Perhaps two miles, my lord." "Ah, that was carrying a joke a good deal too far; so the sentence of the court upon you is that you be kept at hard labor for two months." On one occasion a juryman begging to be excused from attendance, on the ground of deafness, the Judge said, "Why you can hear me speak?" "That's true enough, my lord; but I have to turn my head round very awkwardly, for I am quite deaf with one ear." "Oh, then, certainly, sir, you are excused," replied Baron Alderson, with mock solemnity, "a juryman undoubtly ought to hear both sides."